No. 92-74

In the Supreme Court of the United States

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF OREGON, PETITIONER

v.

ACF INDUSTRIES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Oregon ad valorem property tax discriminates against rail carriers, in violation of 49 U.S.C. 11503(b)(4), by exempting various types of commercial and industrial property other than railroad cars from the tax.

2. Whether, if the state tax violates 49 U.S.C. 11503 (b)(4), the appropriate remedy is to exempt railroad cars from the tax.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306 90 Stat. 31, 54 (the 4-R Act), was enacted to improve the operations, structure, physical facilities and financial stability of the railway system of the United States. *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of that Act furthers "the goal of * * * railroad financial security" by establishing "a prohibition on discriminatory state taxation of railroad property." 481 U.S. at 457. See also *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204, 207 (8th Cir.

1981).[1] As recodified at 49 U.S.C. 11503,[2] Section 306 (b) declares "[t]he following acts" to be unlawful discrimination and provides that the States and their subdivisions "may not do any of them" (49 U.S.C. 11503 (b)):

> (i) *Subsection (b)(1)*: the assessment of "rail transportation property"[3] at a higher ratio of its true market value than "other commercial and industrial property"[4] is assessed in the same jurisdiction (49 U.S.C. 11503, derived from Section 306(1)(a) of the 4-R Act);[5]
>
> (ii) *Subsection (b)(2)*: the imposition of a tax based on such an improper assessment ratio (49 U.S.C. 11503(b)(2), derived from Section 306(1)(b) of the 4-R Act);
>
> (iii) *Subsection (b)(3)*: the imposition of an ad valorem property tax on "rail transportation property" at a tax rate higher than the rate applicable to "commercial and industrial property" in the same jurisdiction (49 U.S.C. 11503(b)(3), derived from Section 306(1)(c) of the 4-R Act); and
>
> (iv) *Subsection (b)(4)*: the imposition of "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4), derived from Section 306 (1)(d) of the 4-R Act).[6]

2. Oregon imposes an ad valorem tax on real and personal property located within the State (Pet. App. 5a). Various classes of personal property—such as agricultural

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[1] As this Court stated in *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)):

> The legislative history of the antidiscrimination provision in the 4-R Act demonstrates Congress' awareness that interstate carriers "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.

Congress concluded in 1975 that, as the result of discriminatory state taxation, "railroads are over-taxed by at least $50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

[2] The 4-R Act was originally codified at 49 U.S.C. 26c. It was recodified in 1978 at 49 U.S.C. 11503 by the Revised Interstate Commerce Act, §§ 11101, 11503 Pub. L. No. 95-473, 92 Stat. 1419, 1445. As this Court observed in *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), although the statutory language of Section 306 was slightly altered upon its recodification in 1978, the Revised Interstate Commerce Act provides that the change in statutory language "may not be construed as making a substantive change in the laws replaced" (481 U.S. at 457 n.1, quoting Section 3(a) of the Revised Interstate Commerce Act, Pub. L. No. 95-473 92 Stat. 1466). Both versions of the statute are set out in the appendix to the petition (Pet. App. 35a-41a). In this brief, for the reasons explained in *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d 368, 370 n.2 (5th Cir. 1987), we will refer to the current codification in describing the statute. Subsections (b)(1) through (b)(4) of the current codification—as described in the text—correspond to Sections 306(1)(a) through 306(1)(d) of the 4-R Act (90 Stat. 54). 49 U.S.C. 11503.

[3] The term "rail transportation property" is defined to mean property "owned or used" by railroads. 49 U.S.C. 11503(a)(3).

[4] The term "commercial and industrial property" is defined to mean "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. 11503(a)(4).

[5] The Act, however, contains an exception that allows the States to assess railroad property at a percentage of its true market value that is as much as 5% greater than the percentage that is applied to non-railroad property. This exception is contained in the provisions that authorize the federal courts to enjoin state violations of the Act. See 49 U.S.C. 11503(c).

[6] As originally enacted, Section 306(1)(d) of the 4-R Act proscribed "any other tax which results in discriminatory treatment of a common carrier by railroad" (Pet. App. 39a). In its recodification as Subsection (b)(4), the language was revised to proscribe "another tax that discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

machinery and equipment, business inventories, livestock, poultry, bees and agricultural products in the possession of farmers—are exempt from the State's tax (Ore. Rev. Stat. Ann. § 307.400 (1992)). Some classes of personal property—such as motor vehicles—are exempt from the personal property tax but are subject to registration or other fees in lieu of the property tax (§ 803.585).[7] Railroad cars are classified as personal property and are not exempt from the State's tax (Pet. App. 5a).

Respondents are engaged in the business of leasing railroad cars to shippers and railroads (Pet. App. 22a).[8] Respondents filed this action in federal district court, seeking declaratory and injunctive relief against the assessment and collection of Oregon's personal property tax with respect to their railroad cars. Respondents claimed that, because of the exemptions available for various types of non-railroad commercial property, the state tax violates Subsection (b)(4) because it "discriminates against a rail carrier" (49 U.S.C. 11503(b)(4)).

As a threshold question, the district court considered whether respondents had standing to raise a claim under this statute (Pet. App. 25a-28a). Respondents are car rental companies and are not not themselves "rail carriers." Respondents contended, however, that a tax that discriminates against rail *cars* necessarily results in discrimination against rail *carriers* (*id.* at 25a). The court noted that such an argument, pressed to its extreme, "could produce absurd results" (*id.* at 27a).[9] The court

[7] Similarly, various classes of real property—such as standing timber—are exempt from the ad valorem real property tax and are, instead, taxed upon production or severance under a different tax scheme (see Ore. Rev. Stat. Ann. § 321.272 (1992)).

[8] Some of respondents lease nearly all of their cars to shippers; others lease nearly all of their cars to railroads; others lease significant numbers of cars to both (Pet. App. 22a).

[9] As the court stated, "[i]f any company that furnishes products to the railroad industry asserted standing under [Subsection (b)(4)], there would be almost no limit to standing" (Pet. App. 27a).

held, however, that, "given the undisputed close connections between [respondents] and the railroad industry," the link between discriminatory treatment of rail cars and rail carriers is sufficiently clear that respondents have standing to challenge the tax under Subsection (b)(4) (Pet. App. 27a-28a).

On the merits, the district court held that the state tax does not violate the non-discrimination requirements of Subsection (b)(4). The court first noted (Pet. App. 28a) that Oregon assessed railroad property at the same percentage of its true market value as it assessed the other types of commercial property subject to the tax, and thus did not violate Subsection (b)(1) or (b)(2).[10] Oregon also did not apply a different tax rate in taxing railroad property than it applied in taxing non-railroad property, and thus did not violate Subsection (b)(3). See Pet. App. 28a-29a.

The court then addressed whether the State's tax discriminates against railroads in violation of Subsection (b)(4) by wholly exempting various types of non-railroad property from the tax. The court noted that state property taxes that exempted more than 50% of non-railroad commercial property had been found to be impermissibly

[10] Under Subsection (b)(1), only other property that is "subject to" property tax may be considered in determining whether an improper assessment ratio is being applied to railroad property. See 49 U.S.C. 11503(a)(4); note 4, *supra*. While different assessment ratios for railroad and non-railroad property would violate Subsection (b)(1) (but see note 5, *supra*), the complete *exemption* of non-railroad property from tax does *not* violate subsection (b)(1) because exempt property is not "subject to" tax. See, *e.g.*, *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567, 1571 (11th Cir. 1987). The allegedly discriminatory effect of exemptions from the state tax therefore must be considered, if at all, under the non-discrimination requirement of Subsection (b)(4). See 830 F.2d at 1573.

discriminatory under Subsection (b)(4) (Pet. App. 32a, citing *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415 (8th Cir. 1988), cert. denied, 470 U.S. 1066 (1989) and *Burlington Northern R.R.* v. *Bair*, 766 F.2d 1222 (8th Cir. 1985)). The court stated that, by contrast, the Oregon exemptions protect only 30% of non-railroad commercial property from the state tax (Pet. App. 32a). The court concluded that, even if "there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here" (*ibid.*). The court found no authority for the proposition that "an exemption of approximately 30% [is] impermissibly discriminatory" (*ibid.*).

3. The court of appeals reversed (Pet. App. 1a-19a). With respect to the threshold question of whether respondents have standing to challenge the tax under Subsection (b)(4), the court of appeals agreed with the district court that the statute "prohibits any tax that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect" (Pet. App. 7a n.2). The court further noted that the State had "apparently abandoned" this issue on appeal (*ibid.*).[11]

On the merits, the court of appeals disagreed with the district court's conclusion that the exemption of a sizeable percentage of non-railroad property under the State's tax scheme is permissible under Subsection (b)(4). In the court's view, "[t]he most natural reading" of the statute is that it "is violated by *any* exemption given to other taxpayers but not to railroads" (Pet. App. 16a). The court stated that, under the calculation most generous to the State, 25% of non-railroad commercial property is

[11] Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). By this, we take it that petitioner now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax also could not be applied to the rail cars owned by the respondents in this case.

exempt from property tax (*id.* at 18a). The court held that that level of discrimination "far exceeds any possible *de minimis* exeeption" to Subsection (b)(4) and thus violates the non-discrimination requirement of the statute (Pet. App. 19a).

In reaching that conclusion, the court of appeals rejected the State's claim that Subsection (b)(4) cannot apply to ad valorem property taxes. The State argued that since Subsections (b)(1) through (b)(3) establish specific rules for property taxes, and since Subsection (b)(4) by its terms proscribes discrimination resulting from "any other tax" (or, in the recodified version of the statute, "another tax" (see note 6, *supra*)), the "other tax" referred to in Subsection (b)(4) must be a tax "other" than a property tax. The court rejected that claim because, as several other courts have held,[12] Subsections (b)(1) through (b)(3) do not address taxes that are discriminatory because of undue exemptions; by contrast, Subsection (b)(4) was enacted "to prevent tax discrimination * * * in *any form whatsover*" (Pet. App. 12a, quoting *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 210). Even though exemptions of non-railroad property are excluded from consideration in applying the per se rules of Subsections (b)(1) through (b)(3) to determine whether an improper assessment ratio or tax rate has been applied by the State (see note 10, *supra*), the court held (Pet. App. 12a-13a) that the existence of such exemptions is relevant in evaluating whether the state tax "discriminates against a rail carrier" in violation of Subsection (b)(4).

Having concluded that the exemptions under the Oregon tax impermissibly discriminate against rail carriers in

[12] See *Ogilvie* v. *State Board of Equalization*, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981); *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987). See also *Burlington Northern R.R.* v. *Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415, 416-417 (8th Cir. 1988), cert. denied, 490 U.S. 1066 (1989).

violation of Subsection (b)(4), the court then considered what remedy should be awarded. The court rejected the State's view that respondents "are only entitled to an exemption for the percentage of their property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). Instead, the court held that respondents "were entitled to the same total exemption preferred property owners enjoyed" (*ibid.*). The court therefore directed the district court, on remand, to enjoin the State from collecting its tax on respondents' railroad property.

DISCUSSION

The court of appeals correctly concluded that a state property tax violates Subsection (b)(4) if, by exempting non-railroad commercial property, the tax "discriminates against" rail carriers (49 U.S.C. 11503(b)(4)).[13] Other courts of appeals have consistently reached that same conclusion, although the supreme court of one State has disagreed.[14]

The courts of appeals have not agreed, however, on the analysis to be applied in determining *whether* a particular state tax scheme effects "discrimination" against rail carriers. Several different tests have been used. Because of the conflicting analytical methods applied by the courts of appeals, a tax scheme that would be proscribed in one circuit may be sustained in another.

[13] A threshold question is whether discrimination against property owned by railroad car lessors—such as respondents—establishes discrimination against rail *carriers*, as the statutory cause of action requires (49 U.S.C. 11503(b)(4)). The courts below concluded that such a nexus exists, at least when railroad rolling stock is involved (Pet. App. 7a n.2). Accord, *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, 1302 (8th Cir.), cert. denied, 112 S. Ct. 169 (1991). The issue has, in any event, been waived by petitioner (see note 11, *supra*) and is therefore not presented in this case. There is no doubt that Congress could constitutionally confer standing on respondents; a concrete case or controversy exists with respect to respondents' tax liabilities. *Cf. Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[14] Compare cases cited note 12, *supra*, with *Richmond, Fredericksburg & Potomac R.R.* v. *State Corporation Commn'*, 230 Va. 260, 336 S.E.2d 896 (1985).

The courts also have not agreed on the proper remedy to be granted when discrimination is found. While crafting a proper remedy necessarily involves a fact-specific inquiry concerning the nature of the discrimination observed, the courts appear nonetheless to have adopted different remedial standards. Some circuits would require the States to adopt a method of taxing railroad property that would place such property in a position equivalent to that of the general mass of non-railroad property in the State. See, *e.g.*, *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 378 (citing cases). Other circuits would require the States to give railroad property the most favored treatment available to any class of non-railroad property. See Pet. App. 19a. The latter rule, as applied in this case (*ibid.*), ordinarily results in complete exemption of railroad property. The former rule ordinarily results in proportional taxation.

The conflicting rules that the courts have employed in determining liability for, and relief from, discriminatory state taxation present questions of significant, recurring importance for the States, for the railroad industry, and for the proper implementation of the federal statutory scheme.

1. Subsections (b)(1) through (b)(3) bar the States from imposing higher assessment and tax ratios for railroad property than for non-railroad property. See 49 U.S.C. 11503(b)(1)-(b)(3). Under the per se tests of these Subsections, a court need not consider whether such differential treatment of railroad property constitutes "discrimination." These provisions impose an objective test. The use of differential rates for assessing or taxing railroad and non-railroad property is unlawful without fur-

ther inquiry. See *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. at 464.[15]

By contrast, Subsection (b)(4) applies only when the court finds that the state tax results in "discrimination" against rail carriers. See 49 U.S.C. 11503(b)(4).[16] As several of the courts of appeals have concluded, Subsection (b)(4) is a "catch all" that proscribes "any other tax" method employed by the State that results in discriminatory treatment of rail carriers. See, *e.g.*, *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d at 1573 (property tax exemptions); *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 372-373 (gross receipts tax); *Richmond, Fredericksburg & Potomac R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (Subsection (b)(4) "was intended as a catchall provision designed to prevent discriminatory taxation of a railroad carrier by any means"); *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 209-210 (property tax exemptions).

Thus, while property tax exemptions are not considered in evaluating appraisal and tax ratios under Subsections (b)(1) through (b)(3) (see note 10, *supra*), such exemptions are properly to be considered in determining whether the State has, by this other tax method, effected discrimination against rail carriers. See Pet. App. 13a-

[15] As the Court noted in *Burlington* (481 U.S. at 464), there is an objective, "de minimis" exception for differential assessment ratios under Subsection (b)(1). See also note 5, *supra*. There is no similar exception for differential tax rates under Subsetcion (b)(3).

[16] "[N]othing in the committee reports, debates, or other legislative history focuses specifically on the purpose of [Subsection (b)(4)]." *Richmond, Fredericksburg & Potomac R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985). As noted in *Clinchfield R.R.* v. *Lynch*, 784 F.2d 545, 551-552 (4th Cir. 1986), however, the final version of the 4-R Act, as enacted by Congress in 1976, deleted a provision in the proposed bill that would have made Section 306 inapplicable to States whose constitutions mandated specific tax classification schemes and exemptions for various types of property owned within those States.

16a; *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 416-418; *Ogilvie* v. *State Board of Equalization*, 657 F.2d at 209-210. Any other interpretation of Subsection (b)(4) would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute. See *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 418; *Clinchfield R.R.* v. *Lynch*, 784 F.2d 545, 552 (4th Cir. 1986); note 10, *supra*.[17]

2. While the courts of appeals have agreed that property tax exemptions may be *considered* under Subsection (b)(4),[18] they have not agreed on the analysis to be applied in determining whether a tax containing such exemptions "discriminates against" rail carriers (49 U.S.C. 11503(b)(4)). For example, in *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d at 1574, the Eleventh Circuit stated that, in evaluating whether exemptions are discriminatory, it may be appropriate to "consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial busi-

[17] This interpretation of the statute does not, as petitioner contenda (Pet. 25), require the conclusion that the broad nondiscrimination requirement of Subsection (b)(4) nullifies the specific, objective tests of Subsections (b)(1) through (b)(3). Subsection (b)(4) applies only when the exemptions make the State's tax discriminatory; subsections (b)(1) through (b)(3) apply based upon objective criteria, without a specific finding of "discrimination." Moreover, the court below suggested that some "de minimis" level of exemptions would not be discriminatory under Subsection (b)(4) (Pet. App. 17a-19a). The court concluded that an exemption for 25% of non-railroad property was sufficient to establish discrimination (Pet. App. at 18a).

[18] As noted above, the Supreme Court of Virginia held in *Richmond, Fredericksburg & Potomac R.R.* v. *State Corporation Comm'n*, 230 Va. at 262, 336 S.E.2d at 897, that Subsection (b)(4) does *not* apply to ad valorem property taxes. The court reasoned that "the fourth subparagraph does not refer to *ad valorem* property taxes at all, but rather refers to other or different schemes of taxation not contemplated by the first three subparagraphs." *Ibid.*

nesses by the State'." *Ibid.* (quoting *Alabama Great Southern R.R.* v. *Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981)). The Eleventh Circuit held that "discrimination" exists under Subsection (b)(4) only when the State imposes different tax burdens on different types of property and fails "to treat all persons equally *where no reasonable distinction can be found between those favored and those not favored.*" 830 F.2d at 1574 (quoting *Richmond, Fredericksburg & Potomac R.R.* v. *Department of Taxation*, 762 F.2d at 380 n.4 (emphasis added)). The inquiry into "reasonable distinctions" that would be required under the Eleventh Circuit's analysis is, of course, inconsistent with the largely unqualified statement of the court of appeals in this case that "any exemption not also available to railroads violates the statute" (Pet. App. 17a).

Other courts have specifically rejected the Eleventh Circuit's reasoning. The Eighth Circuit held in *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, cert. denied, 112 S.Ct. 169 (1991), that "under the 4-R Act it is not within our discretion to analyze the disputed tax in the context of [the State's] overall tax structure." 929 F.2d at 1303.[19] The Fifth Circuit reached the same conclusion in *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 375. In these courts' view, the overall fairness of a State's

[19] In *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d at 1302-1303, the Eighth Circuit concluded that "an [] in-depth examination of [the State's] [complete] tax structure" is not required to evaluate a claim of discrimination under Subsection (b)(4). The court relied for that conclusion on this Court's decision in *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979). In that case, the Court held that, in determining whether a State had violated the federal statute that proscribes a state tax "on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, * * * retailers, or consumers of * * * electricity" (15 U.S.C. 391), it was necessary only to look at "the type of tax the federal statute names, rather than to consider the entire tax structure of the State" (441 U.S. at 150).

tax system is not relevant in determining whether a particular tax discriminates against rail carriers in violation of the statute (929 F.2d at 1303, quoting 817 F.2d at 375):

> [The statute] forbids some fair arrangements because the actual fairness of these arrangements is too difficult and expensive to evaluate.

The courts that look only to the challenged tax—and not to the State's entire tax structure—in evaluating claims of discrimination are not in agreement, however, as to how substantial the different treatment of railroad and non-railroad property must be to violate the statute. In the present case, the court stated that "any exemption not also available to railroads violates the statute," although the court suggested that "a *de minimis* level" of exemptions *might* be permissible (Pet. App. 17a).[20] That reading of the statute is more absolute than other courts have adopted. In evaluating discrimination claims under Subsection (b)(4), other courts have considered whether the exemptions apply to a "significant portion" of non-railroad property (see *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d at 1569-1570) or whether the State has singled out railroads as one of a "small group" of taxpayers (see *Kansas City Southern Ry.* v. *McNamara*, 817 F.2d at 376).[21] Prior decisions addressing the discriminatory effect of property tax exemptions have in-

[20] The court noted (Pet. App. 17a) that, in *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. at 464, this Court characterized the 5% differential in assessment ratios permitted by 49 U.S.C. 11503(c) as a "de minimis" exception to the objective assessment ratio test established in Subsection (b)(1).

[21] See also *Burlington Northern R.R.* v. *City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991) (Subsection (b)(4) requires the States to tax "railroads as members of larger taxpayer groups—owners of commercial or industrial property, recipients of gross income, recipients of net income, whatever. [The States] cannot levy a tax on inputs into railroading alone.").

volved situations in which an unquestionably large portion of the comparable, non-railroad property in the State was exempt. See, *e.g.*, *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 418 ("three-fourths of the commercial and industrial personal property in the state is not taxed"). These decisions thus offer no direct support for the ostensibly inflexible bright-line discrimination test adopted by the court in the present case.

The decisions of the several circuits do not reflect a consistent understanding of the content of the prohibition in Subsection (b)(4) against discriminatory state taxation of rail carriers. Absent guidance from this Court, the validity of identical state tax systems would be tested under different standards, leading predictably to different results, based solely upon the circuit in which the tax is assessed.

3. When discrimination has occurred, there remains the question of the proper remedy. In cases involving violations of the equal assessment and tax rate requirements of Subsections (b)(1) through (b)(3), courts have not set aside the state ad valorem property tax in its entirety. Instead, they have required the assessment or tax rate for railroad property to be adjusted to equal that applicable to the general mass of commercial and industrial property subject to the state tax. See *Clinchfield R.R.* v. *Lynch*, 784 F.2d at 550-551. For example, in *General American Transportation Corp.* v. *Kentucky*, 791 F.2d 38 (6th Cir. 1986), the court held that, when more than one tax rate is applicable to various classes of property, transportation property may be taxed at a rate reflecting the weighted average of the various rates and need not be taxed at the most favorable rate. Accord *ACF Industries, Inc.* v. *Arizona*, 714 F.2d 93, 95 (9th Cir. 1983).

In this case, however, the court of appeals rejected the State's contention that the remedy for discriminatory exemptions under Subsection (b)(4) should be "an exemption for the percentage of [railroad] property corresponding to the percentage of all non-railroad property that is exempt" (Pet. App. 19a). The court concluded instead that railroad property should be totally exempt from the State's tax, in order to place railroads in the same position that "preferred property owners enjoy[]" (*ibid.*). The court noted that the same remedy of complete exemption for railroad property had been awarded by the Eighth Circuit in *Trailer Train Co.* v. *Leuenberger*, 885 F.2d at 418, where the State had exempted three-quarters of all non-railroad commercial property from the state tax.

By contrast, in *Burlington Northern R.R.* v. *Bair*, 766 F.2d at 1224, the Eighth Circuit held that a "total exemption" for railroad property should not be awarded, even though "ninety-five percent of personal property owners" were exempt from the state tax. The court held, instead, that it was sufficient to provide railroad property owners with the same assessment and tax credit advantages that the State had generally made available to others. *Ibid.* Similarly, in *Clinchfield R.R.* v. *Lynch*, the Fourth Circuit held that an equitable remedy should be designed to remove only the discriminatory effects of the state tax and not to cause its "total eradication." 700 F.2d 126, 131 n.6 (1983).

The selection of a proper remedy under Subsection (b)(4) is an inherently fact-specific task, since the proper remedy must be designed to address the specific discrimination that has been observed. Nonetheless, the rationales employed by the various circuits in selecting a proper remedy under Subsection (b)(4) have not been consistent. While some courts have sought to design a remedy to provide equivalent treatment for railroad and non-railroad property, other courts (including the court below) have concluded that providing railroads with the "most favored" treatment available under state law is necessary to implement the statutory non-discrimination command.

The selection of a proper remedy is necessarily related to the substantive content of the prohibition to be enforced. For example, a different remedy would be indicated if the statute were construed to prohibit (i) discrimination against railroads as compared with other property owners generally or (ii) discrimination against railroads as compared with any single other, more favored, class of property owners. If the Court determines to grant certiorari on the first question presented in this case, it would therefore also be appropriate for the Court to grant certiorari on the second question, to consider the proper scope of the relief to be awarded for a violation of Subsection (b)(4).

4. As the numerous alternative analyses employed by the various courts of appeals reflect, both the scope of liability and the proper remedy to be selected under Subsection (b)(4) are recurring questions of substantial financial importance to the States and to the railroad industry. Petitioner states that the decision in this case will reduce the State's property tax revenues "at least $9 million a year" (Pet. 27). The *amicus* MultiState Tax Commission reports (Amended Br. 13-14) that, for the 22 States that responded to its survey, as much as $107 million of property tax revenues collected from the railroad industry each year could be affected by the decision in this case. To the extent that the States' tax collections are reduced, of course, the railroad industry would benefit commensurately.

The questions presented in this case thus have a significant and recurring importance for the States and the railroad industry. In the absence of guidance from this Court, the answer to these questions will vary based solely upon the circuit in which the particular tax is assessed. In this manner, Congress's goal of imposing a uniform, nation-wide, non-discrimination requirement through enactment of Subsection (b)(4) would be frustrated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60240